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6 **IN THE UNITED STATES DISTRICT COURT**

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8 **FOR THE DISTRICT OF ARIZONA**

9 Randy E. Bradley; Joanne C. Bradley,

No. CV13-00814-PHX DGC

10 Plaintiffs,

11 vs.

**ORDER**

12 JP Morgan Chase Bank, National Association;  
 13 All Persons Claiming Any Legal Or Equitable  
 14 Right, Title, Lien To Property Commonly  
 15 Known As; 4815 East Moonlight Way Paradise  
 Valley AZ, 85253,

16 Defendants.

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18 Defendant JP Morgan Chase Bank (“Chase”) has filed a motion to dismiss the  
 19 complaint of *pro se* Plaintiffs Randy and Joanne Bradley. Doc. 7. The motion is fully  
 20 briefed. Docs. 11, 12. For the reasons discussed below, the Court will dismiss the  
 21 complaint with leave to amend.

22 **I. Background.**

23 Plaintiffs obtained a loan from Washington Mutual Bank, F.A. (“WAMU”) in  
 24 August 2007, secured by property at 4815 East Moonlight Way, Paradise Valley,  
 25 Arizona. In 2008, Plaintiffs received notice that Defendant had acquired WAMU and  
 26 would thereafter be servicing Plaintiffs’ loan. Upon viewing a customer service notice  
 27 from Defendant entitled “Help for Homeowners” that detailed refinance and loan  
 28 modification options for eligible customers, Plaintiffs applied for a loan modification.

1 Plaintiffs allege that Defendant's consideration and subsequent denial of their  
2 application violated the terms of a Pooling and Servicing Agreement that governed the  
3 loan.

4 Plaintiffs commenced this action by filing a complaint in Maricopa County  
5 Superior Court alleging breach of contract, misrepresentation, breach of the covenant of  
6 good faith and fair dealing, and breach of fiduciary duty. Defendant removed the case to  
7 this Court and moved to dismiss the complaint under Rule 12(b)(6). Doc. 7. Plaintiffs  
8 responded to the motion eight days after the time to file a response had expired.<sup>1</sup>  
9 Doc. 11.

## 10 **II. Legal Standard.**

11 When analyzing a complaint for failure to state a claim to relief under Rule  
12 12(b)(6), the well-pled factual allegations are taken as true and construed in the light  
13 most favorable to the nonmoving party. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th  
14 Cir. 2009). Legal conclusions couched as factual allegations are not entitled to the  
15 assumption of truth, *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009), and they are  
16 insufficient to defeat a motion to dismiss for failure to state a claim, *In re Cutera Sec.*  
17 *Litig.*, 610 F.3d 1103, 1108 (9th Cir. 2010). To avoid a Rule 12(b)(6) dismissal, the  
18 complaint must plead enough facts to state a claim to relief that is plausible on its face.  
19 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The Court must construe the  
20 complaint liberally because Plaintiffs are proceeding *pro se*. See *Hughes v. Rowe*, 449  
21 U.S. 5, 9 (1980).

22 The Court generally will not consider evidence or documents beyond the  
23 complaint when ruling on a Rule 12(b)(6) motion. "A court may, however, consider  
24 certain materials – documents attached to the complaint, documents incorporated by  
25 reference in the complaint, or matters of judicial notice – without converting the motion

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26 <sup>1</sup> Although Defendant has objected to Plaintiffs' late response (Doc. 12), the Court  
27 will exercise its discretion and consider the filing in light of Plaintiffs' *pro se* status.  
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1 to dismiss into a motion for summary judgment.” *United States v. Ritchie*, 342 F.3d  
2 903, 908 (citations omitted); *see also Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir.  
3 2005) (noting that the court may take into account documents “whose contents are  
4 alleged in a complaint and whose authenticity no party questions, but which are not  
5 physically attached to the [plaintiff’s] pleading.”).

6 Defendant attached the Pooling and Servicing Agreement (“PSA”) to its motion  
7 to dismiss. Plaintiffs did not physically attach this document to the complaint, but the  
8 complaint alleges its content and the document is central to Plaintiffs’ claims. Plaintiffs’  
9 response does not contest the authenticity of the document. Accordingly, the Court will  
10 consider the PSA in this decision.

### 11 **III. Analysis.**

#### 12 **A. Breach of Contract.**

13 To state a breach of contract claim, “the complaint must allege an agreement, the  
14 right to seek relief, and breach by the defendant.” *Commercial Cornice & Millwork,*  
15 *Inc. v. Camel Constr. Servs. Corp.*, 739 P.2d 1351, 1355 (Ariz. 1987) (citing *City of*  
16 *Tucson v. Superior Ct.*, 569 P.2d 264 (Ariz. 1977)). Although Plaintiffs did not list a  
17 breach of contract claim in the caption of their complaint, nor in the introductory  
18 summary of their causes of action, (Compl. [Doc. 1-1 at 3-11] at ¶ 1), it appears from the  
19 substance of their claims that they intended to bring a claim for breach of contract.  
20 Because Defendant also made this assumption and responded to the claim, the Court will  
21 address it here.

22 Plaintiffs claim that Defendant breached the terms of the PSA existing between  
23 WAMU and themselves. Defendant argues that it did not become a successor in interest  
24 to this contract when it acquired WAMU, but the Court need not assess the validity of  
25 this argument because the claim fails regardless. Thus, for purposes of this motion only,  
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1 the Court will construe the facts in favor of Plaintiffs and assume that Defendant became  
2 a party to the PSA when it purchased WAMU.<sup>2</sup>

3 Plaintiffs' theory of the breach rests on an unspecified clause in the PSA which  
4 states in relevant part that "the servicer shall not permit any modification with respect to  
5 any Mortgage loan." Compl. at ¶ 21. The complaint clearly states that Defendant  
6 denied Plaintiffs' application for modification. Compl. at ¶ 17. Thus, Defendant could  
7 not have breached the contract on the facts alleged because it did not modify the loan.  
8 Given the facts as pled by Plaintiffs, Defendant complied with the PSA. Because  
9 Plaintiffs' facts do not support their claim that Defendant breached the contract, the  
10 Court will dismiss this claim.

#### 11 **B. Breach of the Covenant of Good Faith and Fair Dealing.**

12 As a matter of law, there can be no breach of the covenant of good faith and fair  
13 dealing without a valid contract between the parties. *Norman v. State Farm Mut. Auto.*  
14 *Ins. Co.*, 33 P.3d 530, 532 (Ariz. 2001) (holding that it is a "well-settled principle" that  
15 "a contract must exist before there can be a breach of the covenants of good faith and  
16 fair dealing."). As explained above, the Court will assume for the purposes of this  
17 motion that a valid contract existed between Plaintiffs and Defendant. The claim fails  
18 regardless because the complaint does not identify the specific actions by which  
19 Defendant allegedly breached the covenant.

#### 20 **C. Breach of Fiduciary Duty.**

21 The complaint states that Chase owes Plaintiffs a fiduciary duty because Chase  
22 "receive[s] payments from Plaintiffs along with thousands of other American  
23 taxpayers." Compl. at ¶ 32. It further contends that Chase breached its fiduciary duty  
24 by "intentionally deceiving" Plaintiffs about Chase's authority to modify the terms of

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26 <sup>2</sup> Plaintiffs should understand that the Court will not make this assumption with  
27 respect to any amended complaint. If Plaintiffs seek to assert a breach of contract claim  
28 in their amended complaint, they must precisely identify the contract in question.

1 Plaintiffs' loan and by "conducting untrustworthy business practices." Compl. at ¶ 34.  
 2 Plaintiffs' conclusion that entities receiving government support owe a fiduciary duty to  
 3 individual taxpayers is faulty. Plaintiffs' conclusion that mortgage lenders owe a  
 4 fiduciary duty to borrowers is similarly flawed. "It is well settled in Arizona that a  
 5 mortgage lender does not owe a fiduciary duty to a borrower." *Gould v. M & I Marshall*  
 6 *& Isley Bank*, 860 F.2d 985, 989 (Ariz. 2012). For this claim to proceed, Plaintiffs must  
 7 show that a fiduciary duty existed and must identify which specific actions of Defendant  
 8 breached the duty. The complaint does neither.

#### 9 **D. Misrepresentation.**

10 Plaintiffs have failed to state whether they are asserting a claim for fraudulent  
 11 misrepresentation or negligent misrepresentation. The two are separate causes of action,  
 12 with different elements and damages, and may not be pled under a general  
 13 "misrepresentation" claim. W. Prosser and W. Keeton, *The Law of Torts*, § 105 at 727,  
 14 § 107 at 740 (5th ed. 1984); *see also Pettay v. Ins. Mktg. Servs., Inc.*, 752 P.2d 18, 21  
 15 (Ariz. 1987) (holding that negligent and fraudulent misrepresentation are separate torts  
 16 that must be individually and specifically pled). Without specifying which claim they  
 17 intend to bring, Plaintiffs have failed to put Defendant on proper notice of their claim.

18 In order to prove fraud, a plaintiff must show: (1) a representation, (2) its falsity,  
 19 (3) its materiality, (4) the speaker's knowledge of its falsity or ignorance of its truth,  
 20 (5) the speaker's intent that it be acted upon by the hearer in the manner reasonably  
 21 contemplated, (6) the hearer's ignorance of its falsity, (7) the hearer's reliance on its  
 22 truth, (8) the hearer's right to rely on it, and (9) the hearer's consequent and proximate  
 23 injury. *Wells Fargo Credit Corp. v. Smith*, 803 P.2d 900, 905 (Ariz. 1990). In addition,  
 24 Plaintiffs must plead fraud with particularity under Rule 9(b). "Fraud may never be  
 25 established by doubtful, vague, speculative, or inconclusive evidence." *Echols v. Beauty*  
 26 *Built Homes, Inc.*, 647 P.2d 629, 631 (Ariz. 1982) (internal quotations and citations  
 27 omitted). The complaint fails to plead the elements of a fraud claim as outlined above.  
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1 It fails to identify specific misrepresentations, when they were made, by whom, how  
2 they misled Plaintiffs, and how Plaintiffs were injured.

3 To prove negligent misrepresentation, “(1) there must be incorrect information  
4 given for the guidance of others in business dealings; (2) the party giving the false  
5 information intended that the other parties would rely on that information and failed to  
6 exercise reasonable care in obtaining or communicating that information; (3) the other  
7 parties were justified in relying on that incorrect information and actually relied to their  
8 detriment, and (4) such reliance caused their damages.” *Auto Fin. Specialists, Inc. v.*  
9 *ADESA Phoenix, LLC*, No. CV–09–0200–PHX–JAT, 2010 WL 1925491, at \*4 (D.  
10 Ariz. May 11, 2010) (citing *Taeger v. Catholic Family Cmty. Serv.*, 995 P.2d 721, 730  
11 (Ariz. 1999)). Arizona courts have adopted the general rule that “[n]egligent  
12 misrepresentation requires a misrepresentation or omission of a fact. A promise of  
13 future conduct is not a statement of fact capable of supporting a claim of negligent  
14 misrepresentation.” *McAlister v. Citibank*, 829 P.2d 1253, 1261 (Ariz. 1992) (emphasis  
15 in original). The complaint fails to plead facts satisfying these requirements.

#### 16 **IV. Leave to Amend.**

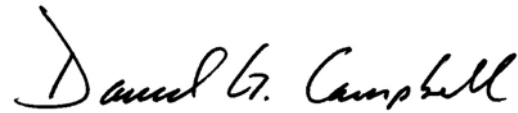
17 Leave to amend should be freely given when justice so requires. Fed. R. Civ. P.  
18 15(a)(2). An amended complaint must adhere to the requirements set forth in Rule 8 of  
19 the Federal Rules of Civil Procedure. Rule 8(a) requires a “short and plain statement of  
20 the claim.” Fed. R. Civ. P. 8(a)(2). Rule 8(d)(1) states that “[e]ach allegation must be  
21 simple, concise, and direct.” A complaint having the factual elements of a cause of  
22 action scattered throughout the complaint and not organized into a “short and plain  
23 statement of the claim” may be dismissed for failure to satisfy Rule 8(a). *See Sparling v.*  
24 *Hoffman Constr. Co.*, 864 F.2d 635, 640 (9th Cir. 1988).

25 Because the Court cannot determine that an amendment could never cure the  
26 complaint’s deficiencies, it will grant leave to amend.

**IT IS ORDERED:**

1. Defendant's motion to dismiss (Doc. 7) is **granted**.
2. Plaintiffs have **30 days** from the date of this order to file a first amended complaint. Failure to do so will result in the Court dismissing the action with prejudice and directing the Clerk to enter judgment accordingly.
3. The Rule 16 Case Management conference currently set for June 19, 2013 at 3:30 p.m. is **vacated**.

Dated this 11th day of June, 2013.



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David G. Campbell  
United States District Judge